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JOSEPH F. SPANIOL, JR.

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NO. 89-213

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

V.

INOCENCIO MUNIZ,
Respondent

ON WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA
MIDDLE DISTRICT

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

- I. ARE PRE-MIRANDA STATEMENTS, INCIDENT TO ROUTINE BOOKING AND FIELD SOBRIETY TESTING, DEMONSTRATIVE RATHER THAN TESTIMONIAL, ALLOWING THEIR ADMISSION TO DEMONSTRATE PHYSICAL ABILITY TO SPEAK?
- II. DO INSTRUCTIONS, CLARIFICATIONS AND BACKGROUND QUESTIONS GIVEN TO AN INDIVIDUAL DURING FIELD SOBRIETY TESTING AND ROUTINE BOOKING NECESSARILY CONSTITUTE "INTERROGATION" WITHIN THE PURVIEW OF THE MIRANDA DOCTRINE?

PARTIES

The caption contains the names of all parties to the proceedings in the courts below.

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	3
CONSTITUTIONAL PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	9
ARGUMENT	11
I. PRE-MIRANDA STATEMENTS, INCIDENT TO ROUTINE BOOKING AND SOBRIETY TESTING, ARE DEMONSTRATIVE RATHER THAN TESTIMONIAL, ALLOWING THEIR ADMISSION TO DEMONSTRATE PHYSICAL ABILITY TO SPEAK.....	11
II. INSTRUCTIONS, CLARIFICATIONS AND BACKGROUND QUESTIONS GIVEN TO AN INDIVIDUAL DURING FIELD SOBRIETY TESTING AND ROUTINE BOOKING DO NOT NECESSARILY CONSTITUTE	

TABLE OF CONTENTS, continued

	<u>Page</u>
"INTERROGATION" WITHIN THE PURVIEW OF THE <u>MIRANDA</u> DOCTRINE.....	17
CONCLUSION.....	25

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases:</u>	
<u>Commonwealth v. Bruder</u> , 365 Pa. Super. 106, 528 A.2d 1385 (1987) allocatur denied, 518 Pa. 635, 542 A.2d 1365, reversed, <u>Pennsylvania v. Bruder</u> , --- U.S. ---, 109 S.Ct. 205 (1988).....	7, 12, & 13
<u>Commonwealth v. Conway</u> , 368 Pa. Super. 488, 534 A.2d 541 (1987) allocatur denied, --- Pa. ---, 549 A.2d 914 (1988).....	7, 12, & 13
<u>Commonwealth v. Mahoney</u> , 400 Mass. 524, 510 N.E.2d 759 (1987).....	13, 22
<u>Commonwealth v. Waggoner</u> , 373 Pa. Super. 23, 540 A.2d 280 (1988), allocatur denied, No. E.D. Allocatur Docket 1988.....	7, 12
<u>Doe v. United States</u> , 487 U.S. ---, ---, 108 S.Ct. 2341, 2347, 101 L.Ed.2d 184, 197 (1988)	15, 20
<u>Lanford v. People</u> , 159 Colo. 36, 409 P.2d 829 (1966)	13
<u>Macias v. State</u> , 515 So.2d 206 (Fla. 1987)	13
<u>Miranda v. Arizona</u> , 384 U.S. 436 (1966)	8, 12, 17, 18, 19, 20, 23 & 24
<u>Oxholm v. District of Columbia</u> , 464 A.2d 113 (D.C. App. 1983)	13

TABLE OF AUTHORITIES, Continued

	<u>Page</u>
<u>Palmer v. State</u> , 604 P.2d 1106 (Alaska 1979)	13, 22
<u>People v. Burhans</u> , 166 Mich. App. 758, 421 N.W.2d 285 (1988)	13, 22
<u>People v. Jacquin</u> , 71 N.Y.2d 825, 522 N.E.2d 1026, 527 N.Y.S.2d 728 (1988).	22
<u>Piqua v. Hinger</u> , 15 Ohio St.2d 110, 238 N.E.2d 766, cert. denied, 393 U.S. 1001 (1968)	13
<u>Rhode Island v. Innis</u> , 446 U.S. 291, 301 (1980)	18
<u>South Dakota v. Neville</u> , 459 U.S. 553 (1983)	18, 23
<u>State v. Bottomly</u> , 208 N.J. Super. 82, 504 A.2d 1223 (Law Div. 1984), aff'd, 209 N.J. Super. 23, 506 A.2d 1237 (App. Div. 1986)	13
<u>State v. Breeden</u> , 374 N.W.2d 560 (Minn. Ct. App. 1985)	13
<u>State v. Finley</u> , 173 Mont. 162, 566 P.2d 1119 (1977)	13

TABLE OF AUTHORITIES, Continued

	<u>Page</u>
<u>State v. Haefer</u> , 110 Wis.2d 381, 328 N.W.2d 894 (Ct. App. 1982)	13
<u>State v. Mannion</u> , 414 N.W.2d 119 (Iowa 1987)	13
<u>State v. Palmer</u> , 206 Conn. 40, 536 A.2d 936 (1988)	13
<u>State v. Roadifer</u> , 346 N.W.2d 438 (S.D. 1984)	13
<u>United States v. Dionisio</u> , 410 U.S. 1 (1973)	14
<u>United States v. Wade</u> , 388 U.S. 218 (1967)	14
<u>Constitutional Provision:</u>	
Pa. Const., art. I, §9	12
U.S. Const., amend. V	4, 12 14, 16, 21 & 25
<u>Statute</u>	
75 Pa.C.S. §1547	19
75 Pa.C.S. §3731	5
<u>Miscellaneous</u>	
Annot. 41 A.L.R. 812 §16 at 848-55	14

OPINIONS BELOW

1. The order of the Supreme Court of Pennsylvania denying the Commonwealth of Pennsylvania's petition for allowance of appeal is reported at ___ Pa. ___, 559 A.2d 36 (1989) and is reproduced in the petition for writ of certiorari filed July 6, 1989, as Appendix A.

2. The Judgment and Opinion of the Superior Court of Pennsylvania, which reversed the decision of the trial court and remanded for proceedings consistent with its Opinion, is reported at ___ Pa. Super. ___, 547 A.2d 419 (1988) and is reproduced in the petition for writ of certiorari filed July 6, 1989, as Appendix B.

3. The Opinion and Order of the Court of Common Pleas of Cumberland County, Pennsylvania, denying defendant's Motion for a New Trial and for Arrest of Judgment is reproduced in the petition for writ of certiorari filed July 6, 1989, as Appendix C.

4. The judgment of sentence of the Court of Common Pleas of Cumberland County, Pennsylvania is reproduced in the petition for writ of certiorari filed July 6, 1989, as Appendix D.

JURISDICTION

The judgment of the Superior Court of Pennsylvania which is sought to be reviewed was rendered on September 8, 1988. The Supreme Court of Pennsylvania denied the Commonwealth's Petition for Allowance of Appeal by order dated May 10, 1989. The petition for writ of certiorari was filed July 6, 1989. This Court granted the petition on October 16, 1989.

The jurisdiction of this Court to review the Judgment and Opinion of the Superior Court of Pennsylvania, Middle District, is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution, Amendment 5, which provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

After a non-jury trial before the Honorable George E. Hoffer on May 20, 1987, the defendant, Inocencio Muniz, was found guilty of driving under the influence in violation of 75 Pa.C.S.A. §3731. Defendant's post-trial motions were denied. Having been previously convicted of driving under the influence in 1985, he was sentenced to imprisonment for not less than 45 days nor more than 23 months. Defendant's conviction was reversed by the Superior Court of Pennsylvania in an opinion filed September 8, 1988.

The defendant's conviction stems from an incident which took place on November 30, 1986. In the early morning hours, Officer David Spotts of the Upper Allen Township Police Department noticed the defendant's vehicle, with hazard lights flashing, stopped on the berm of Route 15 (J.A. 12).

Upon reaching the vehicle and speaking with the defendant, the officer noticed a strong odor of alcohol on the defendant's breath. The defendant's eyes were bloodshot, and his coordination skills were poor (J.A. 13-14).

Believing the defendant was intoxicated, Officer Spotts advised him to remain on the berm until he was sober and not to attempt to drive at that time. The defendant orally agreed to the officer's request, but before the officer had time to return to his own vehicle, the defendant pulled back onto the highway and proceeded to drive away (J.A. 14-15). The defendant was subsequently pulled over by the same officer, who asked for the defendant's license and registration (J.A. 15-16). After producing other documents, the defendant managed to provide the officer with the requested information (J.A. 18). The defendant failed several field sobriety tests, was placed under arrest, and was transported to the Central Booking Center (J.A. 19, 21).

The Booking Center routinely videotapes defendant who have been arrested for driving under the influence so that a permanent record of their condition will be preserved for trial. In accordance with that policy, the defendant was videotaped answering routine questions and taking sobriety tests (J.A. 23-24). The defendant refused to submit to a breathalyzer test (J.A. 27) After the refusal, the defendant was advised of his Miranda rights (State's Ex. 2, J.A. 25, 26).

In reversing the Judgment of Sentence, the Superior Court applied its rationale in Commonwealth v. Bruder, 365 Pa. Super. 106, 528 A.2d 1385 (1987) allocatur denied, 518 Pa. 635, 542 A.2d 1365, reversed, Pennsylvania v. Bruder, ____ U.S. ____, 109 S.Ct. 205 (1988) (recitation of the alphabet was communicative in nature); Commonwealth v. Conway, 368 Pa. Super. 488, 534 A.2d 541 (1987) allocatur denied, ____ Pa. ____, 549 A.2d 914 (1988) (defendant's requests for

clarification of instructions to field sobriety tests were communicative in nature); Commonwealth v. Waggoner, 373 Pa. Super. 23, 540 A.2d 280 (1988), allocatur denied, No. E.D. Allocatur Docket 1988 (October 19, 1988) (entire audio portion of videotape should have been suppressed absent valid waiver of Miranda rights). The Superior Court concluded that the entire audio portion of the videotape in this case constituted compelled testimonial evidence which was elicited before the defendant received Miranda warnings. Finding the evidence should have been excluded, and that the defendant was prejudiced by its admission, the case was reversed and remanded for a new trial.

SUMMARY OF THE ARGUMENT

The defendant, in this case, was routinely processed pursuant to his arrest for driving under the influence. He was required to provide routine background information and perform standard field sobriety tests, which tests involve counting out loud. The verbal portion of these field sobriety tests is demonstrative, rather than testimonial, evidence because it is not evidence upon which reliance is to be placed regarding the defendant's consciousness of facts or the operations of his mind in expressing his consciousness of facts. Rather, the verbal portion of the tests provide physical evidence of intoxication.

In addition to performing the verbal aspects of the field sobriety tests, the defendant made other statements during the processing, including explanations for his inability to perform the tests. None of these statements should have been suppressed because

they were not compelled. The questioning and conduct of the booking agents was designed to obtain routine booking information, explain and execute the standard field sobriety tests, and explain the Implied Consent Law relating to breath testing. None of the booking agents' conduct was designed or expected to elicit substantively incriminating statements by the defendant.

ARGUMENT

I. PRE-MIRANDA STATEMENTS, INCIDENT TO
ROUTINE BOOKING AND SOBRIETY TESTING,
ARE DEMONSTRATIVE RATHER THAN
TESTIMONIAL, ALLOWING THEIR ADMISSION TO
DEMONSTRATE PHYSICAL ABILITY TO SPEAK.

In the instant case, the defendant was videotaped during processing after his arrest for driving under the influence of alcohol. The videotape was part of the routine procedure. As part of processing, the defendant was asked to calculate the date of his sixth birthday, he was asked to count a series of numbers during field sobriety testing, and he was asked if he understood the instructions he was being given. Finally, he was asked if he understood the Implied Consent Law as it related to his right to refuse a breath test (State's Exhibit 2, J.A. 25, 26). The Superior Court of Pennsylvania held that the audio portion of the videotape should have

been suppressed because these were testimonial utterances compelled in violation of the Fifth Amendment of the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution.¹

In reaching its decision in the instant case, the Pennsylvania Superior Court relied on its own rationale in Commonwealth v. Waggoner, 373 Pa. Super. 23, 540 A.2d 280, (1988), allocatur denied, No. 444 E.D. Allocatur Docket 1988 (October 19, 1988); Commonwealth v. Conway, 368 Pa. Super. 488, 534 A.2d 541 (1987), allocatur denied, ____ Pa. ____, 549 A.2d 914; and Commonwealth v. Bruder, 365 Pa. Super. 106, 528 A.2d 1385 (1987), allocatur denied, 518 Pa. 635, 542 A.2d 1365, reversed

¹ The court decided that Article I, Section 9 of the Pennsylvania Constitution offers protection identical to that afforded by the Fifth Amendment of the Federal Constitution. Hence, this Court's interpretation of the federal protections controls the outcome of this case. Petition for Writ of Certiorari, filed July 6, 1989, Appendix B at B4.

Pennsylvania v. Bruder, ____ U.S. ____,
57 109 S.Ct. 205 (1988).² The Superior Court
decided that the result in the instant case is
controlled by its previous conclusions in
Bruder and Conway that evidence of a
defendant's inability to recite the alphabet
and the videotaped evidence of a DUI
defendant's conduct are communicative rather
than demonstrative evidence.

The Superior Court incorrectly
concluded that asking a person to demonstrate
his physical ability to speak is testimonial
in nature and thereby encompassed within the

² This Court reversed the Superior
Court's decision in Pennsylvania v. Bruder,
____ U.S. ____, ____, n.3 109 S.Ct. 205, 207 n.3
(1988) (reversing the Opinion of Cirillo,
P.J.) (recognizing, but not reaching, the issue
of whether recitation of the alphabet in
response to custodial questioning is
testimonial and hence admissible under Miranda
v. Arizona, 384 U.S. 436 (1966)).

protections of the Fifth Amendment.³ This
Court has previously held that the use of a
defendant's voice as an identifying physical
characteristic for the purpose of evaluating
the physical properties of that voice does not
violate the defendant's Fifth Amendment
rights. United States v. Dionisio, 410 U.S. 1
(1973); United States v. Wade, 388 U.S. 218

³ Other state courts have held that
statements incident to physical coordination
tests including the recitation of the alphabet
or the counting of numbers are not testimonial
evidence within the purview of the Fifth
Amendment. Palmer v. State, 604 P.2d 1106
(Alaska 1979); Lanford v. People, 159 Colo.
36, 409 P.2d 829 (1966); Oxholm v. District of
Columbia, 464 A.2d 113 (D.C. App. 1983);
State v. Mannion, 414 N.W.2d 119 (Iowa 1987)
(dictum); Commonwealth v. Mahoney, 400 Mass.
524, 510 N.E.2d 759 (1987); People v. Burhans,
166 Mich. App. 758, 421 N.W.2d 285 (1988);
State v. Breeden, 374 N.W.2d 560 (Minn. Ct.
App. 1985); State v. Finley, 173 Mont. 162,
566 P.2d 1119 (1977); State v. Bottomly, 208
N.J. Super. 82, 504 A.2d 1223 (Law Div. 1984),
aff'd, 209 N.J. Super. 23, 506 A.2d 1237 (App.
Div. 1986); Pigua v. Hinger, 15 Ohio St.2d
110, 238 N.E.2d 766, cert. denied, 393 U.S.
1001 (1968); State v. Roadifer, 346 N.W.2d 438
(S.D. 1984); State v. Haefer, 110 Wis.2d 381,
328 N.W.2d 894 (Ct. App. 1982); Annot. 41
A.L.R. 812 §16 at 848-55 and cases cited
therein. Cf. State v. Palmer, 206 Conn. 40,
536 A.2d 936 (1988); Macias v. State, 515
So.2d 206 (Fla. 1987).

(1967). There is nothing substantively incriminating in counting a sequence of numbers or in other conversation incident to the videotaping process. This Court has consistently recognized that "in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." Doe v. United States, 487 U.S. ____, ____, 108 S.Ct. 2341, 2347, 101 L.Ed.2d 184, 197 (1988) (footnote omitted). Thus, asking the defendant to count out loud during testing elicits demonstrative, not testimonial, evidence.

Additionally, as part of the processing, the Booking Agents asked the defendant a series of questions to obtain the background information necessary to book him. This evidence circumstantially showed his intoxication by his inability to speak clearly. However, it was non-testimonial in nature because it was not being utilized to prove the truth of that information. The

substance of the defendant's answers were immaterial to proving his intoxication. The import of the evidence was the defendant's manner of speech and the lack of muscular coordination of his tongue and mouth. This is simply the spoken equivalent of walking heel-to-toe down a straight line during the field testing of the muscular coordination of one's legs and torso, rather than of one's lips and tongue. The evidence obtained did not, explicitly or implicitly, relate a factual assertion or disclose information relevant to proving any element of the case against the defendant. This evidence was not testimonial and, therefore, was not protected by the Fifth Amendment.

II. INSTRUCTIONS, CLARIFICATIONS AND
BACKGROUND QUESTIONS GIVEN TO AN
INDIVIDUAL DURING FIELD SOBRIETY TESTING
AND ROUTINE BOOKING DO NOT NECESSARILY
CONSTITUTE "INTERROGATION" WITHIN THE
PURVIEW OF THE MIRANDA DOCTRINE.

In the instant case, the Superior Court of Pennsylvania concluded the audio portion of the defendant's videotaped performance at the Booking Center should have been excluded as evidence because it contained responses and communications elicited from the defendant before he received Miranda warnings. Miranda warnings are not required unless a defendant is subjected to custodial interrogation. Although this defendant was in custody, he was not subject to interrogation as that term is defined by law.

A defendant's statements are not the product of interrogation unless those statements were made in response to police

This Court has defined interrogation to encompass "words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301 (1980). On the other hand, "[i]n the context of an arrest for driving while intoxicated, a police inquiry of whether the suspect will take a blood alcohol test is not an interrogation within the meaning of Miranda [since] police words or actions normally attendant to arrest and custody do not constitute interrogation." South Dakota v. Neville, 459 U.S. 553, 564 n.15 (1983).

Upon arrival at the Booking Center, and prior to being advised of his constitutional rights, the defendant in this case was asked a series of questions including his address, height, weight, color of eyes, date of birth, age and the date of his sixth birthday. Thereafter, defendant was asked to

perform several field sobriety tests. During the course of testing, the defendant was asked whether or not he understood the instructions. Finally, prior to his Miranda warnings, defendant was informed of the Implied Consent Law.⁴ After making several inquiries about its content, defendant acknowledged he understood it. Thereafter, the defendant stated he recently finished serving a license suspension and did not want his license suspended again (State's Exhibit 2, J.A. 25, 26).

Police conversation with the defendant during the initial routine questioning was not interrogation. All of the questions, except the date of his sixth birthday, were to obtain identifying information necessary to book the defendant. The questions were not designed to elicit any

⁴ Individuals driving on the roadways of Pennsylvania are statutorily deemed to have impliedly consented to undergo chemical testing to determine their blood alcohol content. 75 Pa.C.S. §1547.

substantively incriminating response. Therefore, Miranda warnings were not required. As this Court recently stated in Doe v. United States, ___ U.S. ___, 108 S.Ct. 2341, 2348, "Unless some attempt is made to secure a communication--written, oral or otherwise--upon which reliance is to be placed as involving [the accused's] consciousness of facts and the operations of his mind in expressing it, the demand upon him is not a testimonial one."

Even the question concerning defendant's sixth birthday was not designed to obtain testimonial evidence. Rather, its purpose was to obtain demonstrative, circumstantial evidence of defendant's physical condition. In other words, the question was not designed to obtain evidence which would be used to prove the truth of the matter asserted, i.e. the date of defendant's sixth birthday, but to demonstrate his inability to calculate that date. The question asked the defendant to demonstrate

the physiological functioning of his brain in much the same way as other sobriety tests demonstrated the functioning of his motor skills. As discussed previously, that type of communication is truly demonstrative rather than testimonial in nature and should not come within the purview of the Fifth Amendment.

During the second phase of the videotaping process, the defendant was asked to perform field sobriety tests. The videotape contains defendant's questions about how to perform the sobriety tests. Police conversation during the testing was merely to instruct defendant concerning performance of the tests and to determine whether the defendant understood the instructions. Again, these questions were not designed to provoke substantively incriminating responses but, rather, were for the defendant's benefit. The questions kept the booking agents from erroneously concluding the defendant's intoxication prevented him from performing tests when his poor performance was actually

the result of his inability to understand the instructions. The propriety of the questioning in this case is accentuated by the fact that English was defendant's second language. It was, therefore, eminently reasonable for the booking agents to ascertain the defendant's understanding of the instructions.⁵

During the final stage of the videotaping, the defendant was advised of the Implied Consent Law and asked to take a breathalyzer test. After the Implied Consent Law was explained to the defendant, he was asked if he understood the law. After making several inquiries as to its content, he said that he did.

⁵ The decision of the courts below is in conflict with other state courts which have concluded that similar police conduct does not constitute interrogation. Palmer v. State, 604 P.2d 1106 (Alaska 1979); Commonwealth v. Mahoney, 400 Mass. 524, 510 N.E.2d 759 (1987); People v. Burhans, 166 Mich. App. 758, 421 N.W.2d 285 (1988); People v. Jacquin, 71 N.Y.2d 825, 522 N.E.2d 1026, 527 N.Y.S.2d 728 (1988).

In South Dakota v. Neville, 459 U.S. 553 (1983), this Court concluded that an individual's refusal to submit to a blood-alcohol test was admissible against him because it was not compelled--the state gave the individual the choice to submit to or refuse the test. That is precisely what happened in this case. Like the conversation during sobriety testing, the booking agent's conversation with the defendant during this portion of the processing was not contact calculated to evoke admissions. If the defendant failed to understand the Implied Consent Law, he could not intelligently refuse to submit to the breath test. It is absurd to think that the police cannot ask a person if he understands the law without violating his Miranda rights. In order to help the defendant realize his rights and obligations, the police must ascertain whether he requires further or repeated instructions. Inasmuch as the booking agent's questions were not calculated to, expected to, or likely to evoke

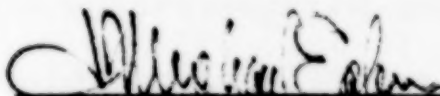
incriminating statements from the defendant, Miranda warnings were not required.

It was error for the Superior Court to conclude the entire audio portion of the videotape should have been suppressed when the defendant's statements were not the product of interrogation. A review of the videotape clearly reveals that the statements the Superior Court found incriminating were not compelled but were voluntary and not responsive to the questioning or conduct of the booking agent.

CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania respectfully asks this Court to reverse the decision of the Superior Court of Pennsylvania. This Court should hold that statements routinely made incident to field sobriety testing and booking procedures are not protected by the Fifth Amendment as they are neither testimonial in nature, nor compelled.

Respectfully submitted,



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